BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

TONY L. CANTRELL Claimant V. **TIMBER CREEK CONSTRUCTION** Respondent AND **INSURANCE COMPANY UNKNOWN** Insurance Carrier AND **KANSAS WORKERS COMPENSATION FUND**	)	Docket No. 1,063,723

ORDER

STATEMENT OF THE CASE

Claimant requested review of the August 12, 2016, preliminary hearing Order entered by Administrative Law Judge (ALJ) Gary K. Jones. Roger A. Riedmiller of Wichita, Kansas, appeared for claimant. David W. Andreas of Winfield, Kansas, appeared for respondent and its insurance carrier (respondent). John C. Nodgaard of Wichita, Kansas, appeared for the Kansas Workers Compensation Fund (Fund).

The ALJ found claimant's work accident was not the prevailing factor for his knee condition and need for treatment, and claimant did not meet his burden of proving the proposed knee treatment was reasonably necessary to cure his foot injury.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the August 11, 2016, Preliminary Hearing and the exhibits; the transcript of the February 4, 2016, Preliminary Hearing; the transcript of the January 14, 2016, Preliminary Hearing and the exhibits; the transcript of the August 11, 2015, Preliminary Hearing and the exhibits; and the transcript of the March 5, 2013, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Claimant notes his treating physician recommended that prior to performing surgery on his compensable foot injury, he must first have his knee surgically repaired. Claimant argues the proposed knee surgery is reasonable and necessary to cure his compensable foot injury, and the ALJ erred in finding otherwise.

The Fund argues the Board lacks jurisdiction to review claimant's appeal. Alternatively, the Fund contends the greater weight of the medical evidence proves claimant's knee condition is preexisting and not the prevailing factor in his current need for treatment. Further, the Fund argues claimant's foot injury can be treated without the necessity of the knee surgery.

Respondent concurs with and adopts the arguments set forth by the Fund.

The issues for the Board's review are:

1. Does the Board have jurisdiction to review claimant's appeal?

2. If so, did claimant meet his burden of proving knee treatment is reasonable and necessary to cure his compensable foot injury?

FINDINGS OF FACT

Claimant worked for respondent beginning in 2009 as a supervisor/foreman and performed full construction work. On December 6, 2012, claimant was working on a two-story scaffold plank, framing a room addition, when the plank broke. Claimant and respondent's owner, who was working alongside claimant, fell approximately 1.5 stories. Claimant testified he directly struck concrete upon his landing, sustaining injuries to both feet, his left shoulder, his knees, and his back. Claimant was taken immediately for treatment. Claimant was diagnosed with a left comminuted calcaneal fracture, a right nondisplaced talus fracture, and a right nondisplaced pilon fracture.

Claimant was referred to Dr. Anthony Pollock, orthopedic surgeon, for treatment. On December 19, 2012, Dr. Pollock performed surgery to repair claimant's left calcaneal fracture, in addition to providing a cast for claimant's right lower extremity. Claimant was unable to bear weight on either leg until approximately March 2013. At that time, claimant testified he began noticing his knees popping while attending physical therapy.

By June 2013, claimant was having problems with his left foot. Dr. Pollock noted claimant was developing some genu varus deformity because of his left foot and ankle deformity. Dr. Pollock determined claimant needed a subtalar fusion and referred him to Dr. John Fanning for a second opinion. In late August 2013, Dr. Pollock noted claimant

was having progressive trouble with valgus deformity of his left knee. Claimant continued treating with a brace, medications, and physical therapy.

Dr. Fanning eventually performed a left subtalar fusion on August 11, 2014. Claimant followed up with physical therapy and medication, gradually returning to weight bearing status by December 2014. Claimant was restricted to sedentary work. On January 22, 2015, Dr. Pollock noted significant degenerative changes to claimant's knees. Dr. Pollock diagnosed claimant with bilateral knee osteoarthritis and recommended a total knee arthroplasty bilaterally. Dr. Pollock opined claimant's work-related injury aggravated an underlying degenerative arthritis, but that claimant's current condition is a result of a preexisting condition.

Claimant underwent a left knee arthroscopy for a torn meniscus in 2005. Claimant testified he injured both knees when he dropped a 600 pound granite counter top, catching it with his knees. Claimant stated Dr. Lynch found torn menisci in both knees, but the right knee tear was minor and did not require surgery. Claimant testified that after he healed from the surgery, he did not require medical treatment for either knee prior to December 6, 2012. Claimant indicated he had "simple arthritis" according to Dr. Lynch, but nothing which prevented him from performing daily activities.[1]

Dr. George Fluter examined claimant on May 13, 2015, at claimant's counsel's request. Claimant complained of constant, distressing pain in his left lower extremity and both knees. Dr. Fluter reviewed claimant's medical records, history, and performed a physical examination. He assessed claimant with:

1. Status post work-related injury; 12/06/12.
2. Right calcaneal fracture; treated non-operatively.
3. Left calcaneal fracture.
4. Status post left foot/ankle surgery; on or about 12/15/12.
5. Status post left foot/ankle fusion surgery; 08/11/14.
6. Bilateral knee pain.
7. Bilateral valgus deformity at the knees.[2]

Dr. Fluter determined, within a reasonable degree of medical probability, there is a causal/contributory relationship between claimant's current condition and his December 6, 2012, work accident. Dr. Fluter noted claimant's medical conditions following the incident resulted in an alteration of his gait mechanics. Dr. Fluter wrote, "The alteration in gait has had an impact on the structure and function of the right and left knees to a point

[1] P.H. Trans. (Aug. 11, 2015) at 20.

[2] *Id.*, Cl. Ex. 1 at 7.

that knee replacement surgery has been recommended."[3] Dr. Fluter opined claimant's December 6, 2012, accident was the prevailing factor for claimant's injury and resulting need for treatment. Dr. Fluter recommended claimant continue under the care of Drs. Pollock and Fanning as clinically indicated, in addition to treating conservatively with medications, braces, and injections. Dr. Fluter recommended temporary restrictions.

Dr. John Estivo examined claimant on July 28, 2015, at respondent's request. Claimant's chief complaints were right and left knee pain, left ankle pain, and left foot pain. Dr. Estivo reviewed claimant's medical history, records, ordered x-rays, and performed a physical examination. Dr. Estivo recorded the following impressions:

> 1. Status post comminuted left calcaneal fracture, requiring open reduction with internal fixation and subsequent subtalar fusion.
> 2. Status post nondisplaced right talus fracture.
> 3. Status post nondisplaced right ankle pilon fracture.
> 4. Preexisting age related degenerative joint disease of the right and left knees, resulting in valgus angulation to both knees.[4]

Dr. Estivo determined claimant's knee complaints are connected with preexisting joint disease, aggravated by the work incident in December 2012. Dr. Estivo noted the x-rays revealed arthritis in both knees, which had been present for many years. He wrote:

> The prevailing factor regarding this patient's right and left knee symptoms with valgus angulation would be his preexisting age related degenerative joint disease to both knees. The incident of 12/06/2012 would be considered an aggravation of a preexisting condition. The degenerative joint disease to both of this patient's knees would be ultimately treated with knee replacements. Any need for a knee replacement, however, would be related to his preexisting degenerative joint disease to the right and left knees.[5]

On August 11, 2015, ALJ Jones ordered an independent medical evaluation (IME) to be performed by Dr. Peter Bieri. Dr. Rodney Bishop, of Dr. Bieri's office, performed the IME on November 3, 2015. Dr. Bieri noted he agreed with and approved of Dr. Bishop's conclusions.[6] After reviewing claimant's medical records, history, and performing a physical examination, Dr. Bishop concluded:

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[3] *Id*.

[4] P.H. Trans. (Aug. 11, 2015), Resp. Ex. 1 at 9.

[5] *Id*.

[6] The ALJ admitted the IME into evidence during the preliminary hearing of January 14, 2016. (See P.H. Trans. [Jan. 14, 2016] at 16.)

> Based on the available evidence I am unable to conclude that the prevailing factor for this claimant's advanced degenerative joint disease of the knees was the accident in question on December 6, 2012. There is x-ray evidence in the record based on Dr. Estivo's report that the claimant had advanced degenerative joint disease.
>
> There is no evidence in the medical record that the claimant required or received any specific treatment to either knee as the result of his fall on December 6, 2012.
>
> Therefore, the prevailing factor in this claimant's knee arthritis is the degenerative joint disease process and not the fall on December 6, 2012. The knee arthritis process represents an antecedent disease unrelated to the patient's fall.[7]

Claimant returned to Dr. Fanning on June 23, 2016, for a follow up appointment with complaints of left foot pain, pain in both knees, and some numbness/tingling in his toes. Claimant indicated he was no longer able to wear his brace because it was not fitting correctly. Dr. Fanning noted:

> [Claimant] is still working through his knee issues with worker's compensation. His knees are bothering him quite a bit.
>
> With regard to the foot, I think he is in need of a new Arizona brace and I will have him see Ed for a new brace. I have discussed shoe wear and activity level with him. Before any kind of revision surgery is considered on his foot he is going to have to have his knee surgery, at least on the involved side.[8]

Dr. Pollock provided his causation opinion in a letter dated June 28, 2016:

> There is no doubt that in all likelihood [claimant's] fall from the scaffold has aggravated his underlying condition, but he did not sustain any fractures to his knees at the time of this fall nor did he sustain any ligamentous injury and did not receive any specific treatment for his knees. Since that time he has developed progressive valgus deformity which is entirely consistent with advancing degenerative arthritis of his knees. In particular, the excision of his lateral meniscus on the left would certainly result in increasing degenerative changes.
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> After review of all the evidence, I would have to agree completely with Dr. Estivo and others that [claimant's] current knee situation is a result of a condition that began well before his fall in 2012 in which he sustained a severe fracture of his left ankle but no demonstrable change in the appearance of his knees at that time. This probably resulted in some additional insult to both knees now resulting in his

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[7] Bishop IME (Nov. 3, 2015) at 6.

[8] P.H. Trans. (Aug. 11, 2016), Fund Ex. 2 at 1.

> present situation which, in my opinion, will require bilateral total knee arthroplasties to both correct the deformities and relieve his pain.[9]

Claimant indicated he was told by Dr. Fanning that knee replacement surgery would need to be performed prior to any procedure related to his foot. Claimant testified:

> Q. But as I read his report, I think what you're telling me is that he's saying if I do the surgery that I want to do and then you have your knees replaced, then I'm going to have to go back in and do another surgery?
>
> A. That was his exact words.
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> Q. So right now he's saying there's no sense proceeding with the surgery if at some point in time you're going to have your knees replaced?
>
> A. Well, in essence, that's – that is to my understanding his feelings about it, that he doesn't want to put somebody, or me especially, through an unnecessary surgery to have to redo it and have it redone.[10]

Dr. Fanning further explained his position on July 25, 2016:

> With regard to [claimant] and his potential foot surgery, all I can tell you is that with a significant valgus deformity to the knee, revision surgery potentially would place his hindfoot in a fused position and then when his knee eventually gets straightened he would be in a malposition, and I think it certainly would compromise his long-term result. I think that, although not completely out of the question, his best long-term result would be obtained with correction of his knee deformity followed by correction of his hindfoot nonunion and deformity.
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> Short of surgery I think his option is continuing with the current treatment including medical treatment for his neuritic type symptoms and a brace for his subtalar nonunion.[11]

PRINCIPLES OF LAW

K.S.A. 44-534a(a)(2) states, in part:

> Upon a preliminary finding that the injury to the employee is compensable and in accordance with the facts presented at such preliminary hearing, the administrative law judge may make a preliminary award of medical compensation and temporary

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[9] P.H. Trans. (Aug. 11, 2016), Fund Ex. 3 at 1.

[10] P.H. Trans. (Aug. 11, 2016) at 25.

[11] *Id*., Fund Ex. 1 at 1.

> total disability compensation to be in effect pending the conclusion of a full hearing on the claim, except that if the employee's entitlement to medical compensation or temporary total disability compensation is disputed or there is a dispute as to the compensability of the claim, no preliminary award of benefits shall be entered without giving the employer the opportunity to present evidence, including testimony, on the disputed issues. A finding with regard to a disputed issue of whether the employee suffered an accident, repetitive trauma or resulting injury, whether the injury arose out of and in the course of the employee's employment, whether notice is given, or whether certain defenses apply, shall be considered jurisdictional, and subject to review by the board. Such review by the board shall not be subject to judicial review. . . . Except as provided in this section, no such preliminary findings or preliminary awards shall be appealable by any party to the proceedings, and the same shall not be binding in a full hearing on the claim, but shall be subject to a full presentation of the facts.

K.S.A. 44-551(l)(2)(A) states, in part:

> If an administrative law judge has entered a preliminary award under K.S.A. 44-534a, and amendments thereto, a review by the board shall not be conducted under this section unless it is alleged that the administrative law judge exceeded the administrative law judge's jurisdiction in granting or denying the relief requested at the preliminary hearing.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[12] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2015 Supp. 44-551(l)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[13]

ANALYSIS

1. Does the Board have jurisdiction to review claimant's appeal?

K.S.A. 44-534a(a)(2) grants a judge jurisdiction to decide issues concerning payment of medical compensation and temporary total disability compensation. "Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a decision.

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[12] K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, *rev. denied* 286 Kan. 1179 (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

[13] K.S.A. 2015 Supp. 44-555c(j).

Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly."[14]

Not every alleged error in law or fact is subject to review. On an appeal from a preliminary hearing Order, the Board can review only allegations that the judge exceeded his or her jurisdiction under K.S.A. 44-551 and jurisdictional issues listed in K.S.A. 44-534a(a)(2), which are: (1) did the worker sustain an accident, repetitive trauma or resulting injury; (2) did the injury arise out of and in the course of employment; (3) did the worker provide timely notice; and (4) do certain other defenses apply. "Certain defenses" refer to defenses which dispute the compensability of the injury.[15]

The ALJ made two findings in his Order. First, he found the work accident was not the prevailing factor causing claimant's knee condition and need for treatment. Second, he found the medical treatment was not necessary to treat claimant's compensable foot condition. Had the ALJ found only the latter, the undersigned would agree the Board does not have jurisdiction.

However, the Board has held, when the underlying point of contention is whether claimant's accident was the prevailing factor in causing the medical condition, the Board has jurisdiction under K.S.A. 44-534a.[16] The undersigned finds the Board has jurisdiction to consider claimant's appeal, as one of the underlying issues is whether claimant's work-related injury is the prevailing factor causing his need for additional medical treatment.

The overwhelming weight of the evidence, including the opinions of Drs. Bieri, Pollock and Estivo, supports the ALJ's finding claimant's work-related accident is not the prevailing factor causing claimant's degenerative knee condition.

2. Did claimant meet his burden of proving knee treatment is reasonable and necessary to cure his compensable foot injury?

The ALJ is within his jurisdiction to determine if medical treatment is necessary to cure and relieve claimant from the effects of his injury. A contention the ALJ has erred in

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[14] *Allen v. Craig*, 1 Kan. App. 2d 301, 303-304, 564 P.2d 552, *rev. denied* 221 Kan. 757 (1977).

[15] See *Carpenter v. National Filter Service*, 26 Kan. App. 2d 672, 994 P.2d 641 (1999).

[16] See *Wilson v. Triangle Trucking, Inc.*, No. 1,063,281, 2013 WL 6920087 (Kan. WCAB Dec. 20, 2013); *Kornmesser v. State of Kansas,* No. 1,057,774, 2013 WL 3368484 (Kan. WCAB June 14, 2013); *Katz v. USD 229*, No. 1,068,293, 2014 WL 4976744 (Kan. WCAB Sept. 12, 2014).

his finding the evidence showed medical treatment was necessary to cure and relieve the effects of an injury is not an argument the Board has jurisdiction to consider.[17]

CONCLUSION

Claimant's work-related accident is not the prevailing factor causing claimant's degenerative knee condition. The Board does not have jurisdiction to review the ALJ's finding claimant failed to meet the burden of proving the requested medical treatment is necessary to cure and relieve claimant from the effects of his injury.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Gary K. Jones dated August 12, 2016, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of October, 2016.

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HONORABLE SETH G. VALERIUS
BOARD MEMBER

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Hon. Gary K. Jones, Administrative Law Judge

[17] See *Bibbs v. Pawnee Mental Health Services*, No. 1,035,339, 2015 WL 6776991 (Kan. WCAB Oct. 16, 2015); *Black-Hunt v. General Motors Corporation*, Nos. 268,530 & 268,531, 2015 WL 996914 (Kan. WCAB Feb. 13, 2015)*; Hulsey v. State of Kansas*, No. 1,048,616, 2013 WL 4051814 (Kan. WCAB July 15, 2013).